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BEFORE THE

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CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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17 In re State Water Resources Control Board
Petition Requesting Changes in Water Rights
18 of the Department of Water Resources and
U.S. Bureau of Reclamation for the California
19 WaterFix Project.

**SAN LUIS & DELTA-MENDOTA WATER
AUTHORITY'S SUGGESTIONS
REGARDING PART 1 BRIEFING**

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1 In a ruling issued December 19, 2016, the Hearing Officers invited the parties to identify any
2 issues they would like to address in closing briefs at the conclusion of Part 1, together with an
3 explanation why each of the issues is more appropriately briefed at the conclusion of Part 1 rather than
4 Part 2. The San Luis & Delta-Mendota Water Authority offers the six issues listed below for briefing
5 at the end of Part 1.

6 The San Luis & Delta-Mendota Water Authority respectfully submits that it is more
7 appropriate to brief each of these issues at the conclusion of Part 1 rather than waiting for conclusion
8 of Part 2, because it will allow the parties to address the evidence presented in Part 1 while that
9 evidence is still relatively fresh in mind, and will avoid potential confusion with evidence adduced
10 only later in Part 2. Discrete briefing for Part 1 will also help prevent any parties from attempting to
11 argue Part 1 issues based on evidence produced only in Part 2. Such concerns have likely informed
12 the State Water Board's standard practice, which is to have briefing at the conclusion of each part of a
13 multi-part water rights proceeding.

14 The San Luis & Delta-Mendota Water Authority proposes the following six issues for briefing
15 at the conclusion of Part 1:

16 **1. Whether the Changes Sought by the WaterFix Petition Would "In Effect"**
17 **Create a New Right**

18 Some parties contend that allowing the new point of diversion needed for operation of the
19 tunnels would in effect create a new water right. The State Water Board has explained that "[a]
20 change may result in the creation of a new right if it increases the quantity of water diverted under the
21 existing right, for example, by appropriating a greater amount of water, increasing the season of
22 diversion, or using a different source of water." (Decision 1651, 2012 WL 5494093, at *22 (Oct. 16,
23 2012).) We submit that no new right would be created by the requested changes.

24 **2. How the Burden of Proof Applies to Legal Injury**

25 Whether the petitioners have carried their burden of proof regarding legal injury has been a
26 major focus of some protestants, who appear to argue that petitioners must both identify the
27 protestants' water rights for them and prove no potential injury to those rights. While the petitioners
28 must demonstrate a reasonable likelihood that the proposed change will not injure any other legal user

1 of water, that obligation does not relieve each protestant from proving he or she has a legal right to use
2 the water involved, or from coming forward with evidence to rebut petitioners' evidence of no injury.

3 **3. What Type of Interest is Necessary to Support a Claim of Legal Injury**

4 In Part 1, the Hearing Officers have not confined protestants to evidence of injury to legally
5 protected interests in water, such as riparian, appropriative or contract rights. The Hearing Officers
6 have allowed evidence of impacts to "human uses that extend beyond the strict definition of legal
7 users of water, including flood control issues and environmental justice issues." While the Hearing
8 Officers allowed this evidence in Part 1, a protest based on a claim of legal injury under Water Code
9 section 1702 still requires a legally recognized right to use of the water involved. Not all protestants
10 have shown such a right.

11 **4. Whether NOD CVP Water Service Contractors Can Claim Legal Injury From**
12 **Reduced CVP Allocations that May Result if WaterFix Restores Operational**
13 **Flexibility**

14 Some North of Delta CVP water service contractors contend that the tunnels will restore
15 operational flexibility the Bureau of Reclamation has lost due to restrictions on CVP operations in the
16 south Delta, and that Reclamation will use that flexibility to restore exports of water to areas South of
17 Delta. They contend that restoring levels of exports will reduce CVP contract allocations to them as
18 compared to recent years, and that this is legal injury cognizable under Water Code section 1702.
19 However, nothing in the North of Delta CVP water service contractors' CVP contracts entitles them to
20 a higher allocation of CVP supply than South of Delta CVP contractors. Hence, any reduced CVP
21 allocation to North of Delta CVP water service contractors that results from Reclamation's restored
22 operational flexibility is not a legal injury cognizable under Water Code section 1702.

22 **5. Whether Any NOD CVP Contractors Can Claim Legal Injury From the**
23 **Reduced CVP Carryover Storage That May Result if WaterFix Restores**
24 **Operational Flexibility**

25 All North of Delta CVP contractors, including settlement contractors, contend that another
26 effect of restoring operational flexibility and potentially restoring levels of exports to areas south of
27 the Delta will be reduced carryover storage in CVP reservoirs. This, they say, exposes them to greater
28 risk of shortage if the following year is dry. However, nothing in their CVP contracts entitles them to
a minimum level of carryover storage in CVP reservoirs. Rather, under their contracts, how to

1 balance between this year's deliveries and carryover storage for next year's obligations and needs is a
2 matter left to Reclamation's reasonable discretion. Hence, any reduced carryover storage that results
3 from restored operational flexibility for the CVP is not legal injury cognizable under Water Code
4 section 1702.

5 **6. Whether Certain In-Delta Protestants Have Proven Existence of a**
6 **Legal Right Sufficient to Support a Claim of Legal Injury**

7 A number of the in-Delta protestants failed to offer any evidence of riparian or appropriative
8 rights, let alone evidence establishing that operation of the tunnels would impair their exercise of
9 those rights. This issue is closely related to issue 3 above.

10 The San Luis & Delta-Mendota Water Authority requests an opportunity to brief the foregoing
11 issues at the conclusion of Part 1.

12 Dated: January 31, 2017

Respectfully submitted,

13 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
14 A Professional Corporation

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16 By: _____

17 Daniel J. O'Hanlon
18 Attorneys for San Luis & Delta-Mendota Water
19 Authority

STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

San Luis & Delta-Mendota Water Authority's Suggestions Regarding Part 1 Briefing

to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated January 13, 2017, posted by the State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:

Method of Service: _____

I certify that the foregoing is true and correct and that this document was executed on January 31, 2017

Date

Signature: 

Name: Terri Whitman

Title: Legal Secretary

Party/Affiliation: SLDMWA

Address: 400 Capitol Mall, 27th Floor

Sacramento, CA 95814